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April 16, 1993

VIA FEDERAL EXPRESS
Honorable Donna R. Searcy
Secretary
Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Judge Searcy:

Enclosed please find an original and four copies of Comments On Proposed Rules On Behalf Of Association Of Information Providers Of New York Info Access, Inc. and American Telnet, Inc.

Very truly yours,

Jane B. Jacobs

Enc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION

regulations and regulators, which impedes growth of this industry in interstate commerce.

Although we welcome any attempt to impose uniformity, we are concerned that such rules not be adopted in such a manner to chill the growth of this fledgling business, which, as Congress and the Federal Communications Commission (hereinafter "FCC") are aware, plays an important role in providing information and services to consumers. Our specific comments as to the Commission's proposed rules are as follows:

1. §§64.1502 and 64.1503: These sections require that any communications common carrier assigning a telephone number to a provider of pay-per-call services require that the programs be in compliance with federal law. Further, if in the "sole judgment" of the carrier the programs are not in compliance, the carrier must terminate service after notice to the service provider.

Although we do take issue with the requirement that pay-per-call services comply with applicable federal law, we believe that the decision as to whether programming is in compliance with federal law cannot be left to the carrier, particularly where, as here, there is no procedure for review of that decision by a neutral third party. We believe that giving this unrestricted and unreviewable power to the common carrier is an unwarranted and an unconstitutional infringement of First and Fifth Amendment rights.

As noted, these rules require the carrier to terminate services that, in the carrier's opinion, do not comply with federal law or regulations. The effect of such unfettered discretion being placed in the hands of a public utility is to afford the carrier the ability to suppress speech without the opportunity to contest the propriety of such action prior to termination. The impact is that Congress and the Commission will sanction this infringement of free speech. This rule also will sanction the taking of property without due process in violation of the Fifth Amendment.

In Freedman v. Maryland, 380 U.S. 51, 58 (1965), the Supreme Court set forth a four-part procedural safeguard that must be met before speech is suppressed. Freedman involved the

Under the proposed rules, a carrier is empowered -- indeed, required -- to terminate expression protected by the First Amendment on its own authority, without judicial review, and without limitation of time.

We believe that this rule runs afoul of Freedman. At a minimum, the common carrier that believes that a service provider is violating the regulations should a) be required to give seventy-two hours advance written notice of termination for an alleged violation; b) upon request by the service provider, be subject to judicial or other third party review by the Commission or some other neutral body; c) have the burden of proof that there has been some violation of federal law; and d) any such procedure must assure prompt judicial or third party review.

Absent these safeguards, pay-per-call programs will be

request therefor...." 47 U.S.C. Section 201(a). This provision has been interpreted to mean that common carriers have a duty to provide service on a non-discriminatory, content-neutral basis. National Association of Broadcasters v. F.C.C., 740 F.2d 1190, 1203 (D.C. Cir. 1984); Humane Society of the United States v. Western Union International, Inc., 30 F.C.C.2d 711 (1971). If a carrier has the unrestricted power to terminate pay-per-call services, and does so based on an incorrect belief that the program violates some federal law, the carrier will be violating its duty to provide service.

We believe that it is critical for a pre-termination review procedure to be implemented here. Such a rule would be the least restrictive means of regulating speech, and would ensure compliance with Section 201(a) of the Communications Act of 1934.

2. §64.1504: This section prohibits the use of a toll free number to provide pay-per-call services. First of all, service providers should not be prohibited from offering services billed privately, assuming that the charge for such service is disclosed. For example, if someone set up an 800 number for information on gardening, and later sent a private bill for that information, such calls should not be regulated under these rules. Additionally, we believe that this provision is not intended to apply to a call to a pay-per-call service that is billed through a credit card or calling card, as opposed to a station to station call billed through the telephone company.

Finally, this section should not be construed in a manner that would interfere with preexisting business relationships. For example, if a caller has a preexisting agreement to be billed for 800 calls, even if that agreement was made during a pay-per-call conversation prior to the effective date of this law, such agreements should be honored. Our clients have incurred costs and expended time and other resources to obtain and maintain such business relationships. That these arrangements are ongoing establishes that they are beneficial to and desired by both parties, and that both parties wish for these arrangements to continue. To disrupt such arrangements would be an unwarranted intrusion into established business relationships.

Moreover, banning the use of toll-free numbers for pay-per-call services also violates the First Amendment because it is not the least restrictive means of furthering the government's interest. Sable Communications of California, Inc. v. F.C.C., ___ U.S. ___, 109 S.Ct. 2829 (1989). The government's interest here is to prevent consumer confusion as to the cost of a call, as "800" numbers commonly are understood to be toll-free. Such confusion can be eliminated in a far less restrictive, yet effective manner, than an outright ban. In lieu of prohibiting the use of 800 numbers and collect call back pay-per-call services, the following procedure could be used: during the 800 call, the caller would be apprised clearly of the cost of the return (collect) call and must take clear affirmative action to request the collect call. During the preamble to the collect

call, the preamble rules would apply, and the caller again would be required to take affirmative action to accept the collect call. Thus, the consumer would be apprised of the price of the call twice, and twice would be required to take affirmative action to accept the charge for the call.

This system addresses the governmental concern without banning this method of conducting business, and also allows the service provider the opportunity to give samples of the product and advise as to the terms of the call during a toll-free 800 portion of the call. This also allows the use of new technologies for the convenience of the customer.

3. §64.1505: This section restricts the use of collect telephone calls in providing pay-per-call services unless "the called party has taken affirmative action clearly indicating that it accepts the charges for the collect service." We seek guidance as to what constitutes "affirmative action". It should be sufficient that the called party, for example, press "1" on a touch tone phone to indicate acceptance of the call. This will avoid the problem that we believe is the objective of this provision.

4. §64.1508: This section requires local exchange carriers to offer an option to block interstate 900 services. Our comment as to this section largely is supportive of the proposed rule. Our experience is that the overwhelming majority of complaints received by our clients fall into two categories: either a blanket denial that the call was made, or the claim that

the call was made by an unauthorized person. Either claim invariably is accompanied by a refusal to pay the charge. Although our clients typically will forgive the charge for such calls, they still incur costs for these calls, and would rather prevent them entirely. To the extent that blocking options are available, fewer such calls will be made, and our clients will incur fewer costs for which they cannot or choose not to bill.

We would, however, take this a step further. If consumers are given an option to block such calls, but choose not to do so, we believe that this should create a presumption that the consumer desires pay-per-call services. When charges for pay-per-call services are incurred by a subscriber that has chosen not to block such calls, there should be a rebuttable presumption that the call was made and the billing was proper. Such presumption could be rebutted by, for example, a showing that the charge is due to a ministerial billing error.

5. §§64.1510 and 64.1511: This section requires that any common carrier providing billing and collection services for pay-per-call services ensure that subscribers are not billed for pay-per-call services that violate federal law, and that carriers must forgive charges or issue refunds for services that violate federal law. For the reasons set forth above with respect to §§64.1502 and 64.1503, we believe that the determination as to what services violate federal law cannot be left to the carrier.

Moreover, when a common carrier provides billing and collection services, they are acting as the agent of the service provider. It would be an inappropriate intrusion on business relationships to make the principal accountable to the agent, and to give the agent sole discretion over its principal's billing issues.

Again, we believe that a Freedman procedure be put into effect to safeguard against such unwarranted intrusions against protected expression and business relationships.

Dated: New York, New York
April 16, 1993

SEHAM, KLEIN AND ZELMAN
Attorneys for ASSOCIATION OF INFORMATION PROVIDERS OF NEW YORK, INFO ACCESS, INC. AND AMERICAN TELNET, INC.

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